APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 03-1174

SL SERVICE, INC.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

Feb. 4, 2004

Before MAYER, *Chief Judge*, BRYSON and LINN, *Circuit Judges*.

MAYER, *Chief Judge*.

The United States Customs Service ("Customs") appeals the judgment of the Court of International Trade granting summary judgment in favor of SL Service, Inc. ("SL Service").[1] *SL Serv., Inc. v. United States*, 244 F.Supp.2d 1359 (Ct. Int'l Trade 2002). Because the Court of International Trade erroneously applied *Texaco Marine Services, Inc. v. United States*, 44 F.3d 1539 (Fed.Cir.1994) ("*Texaco*"), we reverse.

Background

Between November 22 and December 1, 1995, the Sea-Land Pacific, a ship owned by SL Service, was dry-docked at

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[1] On November 9, 1999, the Court of International Trade designated this case a test case. *SL Serv.*, 244 F.Supp.2d at 1360.

the Hongkong United Dockyards for the purpose of obtaining American Bureau of Shipping and United States Coast Guard required inspections and modifications, which are non-dutiable, in addition to dutiable repairs. Upon returning to the United States, Customs assessed a duty pursuant to 19 U.S.C. § 1466(a), which states that "[t]he equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the *expenses of repairs* made in a foreign country upon a vessel documented under the laws of the United States . . . shall . . . be liable to entry and the payment of an ad valorem duty . . . on the cost thereof in such foreign country." (emphasis added).

As part of this assessment, Customs determined that the cost of dry-docking should be considered an "expense of repair" because it was necessitated by the dutiable repairs as well as the non-dutiable inspections and modifications. Customs did not, however, impose the 50% *ad valorem* duty on the full cost of dry-docking. Instead, it determined that only that portion of the cost of dry-docking attributable to the dutiable repairs should be used to calculate the duty. This amount was determined by dividing the cost of dutiable repairs by the sum of the cost of dutiable and non-dutiable work. The cost of dry-docking was then multiplied by this fraction, resulting in an estimation of the cost of dry-docking due to the dutiable repairs. The 50% *ad valorem* duty was applied to this amount.

After having timely protested the liquidation to Customs, SL Service brought this challenge in the Court of International Trade claiming that the duty imposed on dry-docking violated the "but for" test prescribed by *Texaco* and that the apportionment technique was contrary to section 1466(a). In addition, SL Service argued that Customs violated 19 U.S.C. § 1625(c) by failing to provide notice and receive comment about the use of apportionment. Having stipulated that

the Sea-Land Pacific was dry-docked for no longer than necessary to complete the non-dutiable inspections and modifications, both parties moved for summary judgment.

The Court of International Trade granted summary judgment in favor of SL Service. It found that *Texaco* delineated two categories of expenses for the purpose of 19 U.S.C. § 1466(a). The first category, considered "expenses of repairs" and therefore dutiable, would not be incurred "but for" the undertaking of dutiable repairs. The second category, non-dutiable expenses, referred to those expenses incurred for the purpose of obtaining only non-dutiable inspections and modifications as well as those required by both dutiable and non-dutiable work ("dual-purpose expenses"). Based on this reading of *Texaco*, the court determined that the duty was arbitrary, capricious and in violation of the law because the dry-docking of the Sea-Land Pacific was necessitated by both non-dutiable and dutiable work. As such, it was a dual-purpose expense not subject to section 1466(a).

On appeal, Customs contends that the Court of International Trade's interpretation of *Texaco* is too narrow and in contravention of the language and purpose of 19 U.S.C. § 1466(a). Customs claims that the holding in *Texaco* applies only to expenses incurred as the result of either non-dutiable or dutiable work ("single-purpose expenses"), but not to dual-purpose expenses. Further, it argues that section 1466(a), a statute enacted to protect the domestic shipbuilding and repair industry, should not be interpreted in a manner that would allow artful ship-owners to avoid virtually all duties on expenses of foreign repairs.

Discussion

This case raises two questions: (1) whether dry-docking that is required by both dutiable and non-dutiable work is an "expense of repair"; and (2) whether Customs' use of

apportionment is permissible. With respect to both, we answer in the affirmative.

We review a grant of summary judgment by the Court of International Trade *de novo*. *New Zealand Lamb Co., Inc. v. United States*, 149 F.3d 1366, 1367 (Fed.Cir.1998). Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Ct. Int'l Trade R. 56(c); Fed.R.Civ.P. 56(c).

1. The crux of the error below was the court's misinterpretation and resulting misapplication of *Texaco*, in which we were asked to decide whether "cleaning performed subsequent to dutiable repairs . . . [and] . . . work associated with protective coverings used during dutiable repairs" were "expenses of repairs" and, therefore, dutiable. 44 F.3d at 1541. We determined that the expenses at issue were dutiable because they would not have been incurred "but for" dutiable repairs. *Id.* at 1544. In so holding, we announced the following test: "expenses of repairs" covers all expenses "which, but for dutiable repair work, would not have been incurred." *Id.*

The most obvious difference between the facts here and those in *Texaco* is that *Texaco* dealt with single-purpose expenses while the dry-docking of the Sea-Land Pacific was a dual-purpose expense. As such, the "but for" test, which was formulated for classification of single-purpose expenses, is inapplicable. SL Service counters that *Texaco* did, in fact, "consider" dual-purpose expenses. It relies on a footnote in *Texaco*, which states

> Although it appears that some cleaning of the cargo tanks to prepare them to carry cargo would have been necessary even if the repairs had not been made, it also is true that all the debris mentioned in the invoice was created by the repairs. In this regard, the invoice does

> not indicate that the cleaning included the cleaning of the remains of previous cargo. In any event, Texaco has made no effort to separate from the total G-2(g) expenses amounts that would have been incurred to clean the cargo tanks as a normal maintenance service had the G-2 repairs not been made.

44 F.3d at 1548 n. 9. SL Service extrapolates from this that we specifically considered dual-purpose expenses because we noted that the petitioner in *Texaco* could have differentiated the expenses at issue but chose not to. Our observation, however, did nothing to change the nature of expenses at issue, all four of which were single-purpose expenses. *Id.* at 1541-42. It is irrelevant to our determination of the dutiability of dual-purpose expenses that Texaco could have argued that the cleaning expenses were necessitated by both dutiable and non-dutiable work. The precedential force of *Texaco* applies only to single-purpose expenses. This is equally true with respect to *Sea-Land Service, Inc. v. United States*, 239 F.3d 1366 (Fed.Cir.2001), because it addressed the same type of expenses considered by *Texaco*.

SL Service also submits that the discussion in *Texaco* of *United States v. Geo Hall Coal*, 142 F. 1039 (2d Cir.1906), establishes that the "but for" test applies to dual-purpose expenses. 44 F.3d at 1545-46. According to SL Service, the section referring to *Geo Hall Coal* held that dry-docking was not a dutiable expense when it is required by non-dutiable inspections and modifications. This contention, however, is not supported by either case.

First, there is no evidence that the dutiable repairs in *Geo Hall Coal* required dry-docking. The only information available to us now, or in *Texaco*, was contained in an unpublished opinion of the Department of Treasury Board of General Appraisers, which did not specify the type of dutiable repairs performed or whether they necessitated dry-docking. The decision stated only that dry-docking is not *always* an

expense of repairs because dutiable repairs are made. For instance, dry-docking may be required by the inspections and modifications, but not by the dutiable repairs. Therefore, it is just as likely that the outcome in *Geo Hall Coal* is consistent with our holding here. Second, *Geo Hall Coal* addressed a jurisdictional question only. 134 F. 1003 (S.D.N.Y.1905), *aff'd*, 142 F. 1039 (2d Cir.1906). There were no findings with respect to the dutiability of dry-docking. Finally, the discussion in *Texaco* is consistent with the fact that the dutiable repairs in *Geo Hall Coal* did not require dry-docking. 44 F.3d at 1545-46. According to *Texaco*, "the board held that the dry-docking expense was not subject to the vessel repair duty because the board found that the expense would have been incurred irrespective of whether or not dutiable repairs were performed." *Id.* at 1546. This does not imply, as SL Service contends, that dry-docking is never dutiable when required by non-dutiable inspections and modifications. It merely reiterates that the dry-docking in *Geo Hall Coal* was required by the inspections and modifications and would have been needed whether or not the dutiable repairs, which did not necessarily require dry-docking, were performed.

The well-developed history of the "but for" test instructs that special treatment is required when concurrent and independently sufficient acts combine to cause harm. *See* W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 41, at 266 (5th Ed.1984). In one such scenario, two negligently caused fires merged and destroyed a plaintiff's property. *See McClellan v. St. Paul, M & M R. Co.*, 58 Minn. 104, 59 N.W. 978 (1894); Dan B. Dobbs, The Law of Torts § 171, at 414 (2000). "[A] literal and simple version of the but-for test holds that neither defendant's act is a cause of the harm." Dobbs § 171, at 414. Such a result, however, has been universally condemned as "violating both an intuitive sense of causation and good legal policy." *Id.* § 171, at 415; *see also* Restatement (Third) of Torts: Liability for Physical Harm § 27 (Tentative Draft No. 2) ("[C]ourts have long

imposed liability when a tortfeasor's conduct, while not necessary for the outcome, would have been a factual cause if the other competing causal set had not been operating.").

The non-dutiable inspections and modifications and the dutiable repairs are analogous. In the same sense that each fire was responsible for the damage, the dry-docking was equally *caused* by both the non-dutiable and dutiable work. And just as the tortfeasor in concurrent causation cases is held responsible for the harm he causes, it is rational to consider the dry-docking an "expense of repairs."

Texaco did not hold that dry-docking is always non-dutiable when required by inspections and modifications. In fact, there is no basis upon which to contend that it even considered dual-purpose expenses. Dry-docking that is required by dutiable repairs is, therefore, rightly considered an "expense of repairs" and is subject to 19 U.S.C. § 1466(a).

2. SL Service next argues that Customs' method of apportionment is contrary to 19 U.S.C. § 1466(a). According to SL Services' line of reasoning, apportionment is illegal because the imposition of a duty on dry-docking violates the "but for" test. This argument, of course, simply relies on its primary contention that dual-purpose dry-docking is not dutiable. However, apportionment is consistent with section 1466(a) and the "but for" test. In the context of dual-purpose expenses, it is rational to impose the duty on only that portion of the expense that is fairly attributable to the dutiable repairs. Indeed, to impose the 50% *ad valorem* duty on the entire cost of dry-docking in this case would exceed the mandate of the statute. The logical appeal of apportionment has been recognized in other areas of the law. In tort law, "apportionment may be made on the ground that one defendant caused a particular loss or an identifiable share of the loss and should be liable for no more." Dobbs § 170, at 413.

In addition, apportionment has been used by Customs for some time and is, therefore, entitled to deference. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978); *see also Brown v. Gardner*, 513 U.S. 115, 122, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994); *Toyota Motor Sales, U.S.A., Inc. v. United States*, 585 F.Supp. 649, 7 C.I.T. 178, 192 (1984), *aff'd*, 753 F.2d 1061 (Fed.Cir.1985) ("In interpreting a statute a long-standing administrative practice is entitled to deference by the courts, even where, as here, judicial review is *de novo*."). As evidence of its practice, Customs provided three letters documenting the use of apportionment in the liquidation of vessel repair entries. In all three letters the cost of obtaining a gas free certificate was apportioned between the dutiable repairs and non-dutiable work. Customs explained in the letter dated March 31, 1993:

> The costs associated with obtaining a Gas Free Certificate constitute ordinary and necessary expenses incident to repair operations and are thus dutiable. In liquidating these charges, such charges are to be apportioned between the costs which are to be remitted and those for which relief is not warranted, and duty assessed on that portion of the charges applicable to items which are not being remitted. In the present case, as the certificates related to inspections, they should be prorated accordingly.

Customs' long-standing practice of apportioning the cost of various expenses between dutiable repairs and non-dutiable inspections and modifications comports with both the statute and common sense.

Finally, SL Service contends that Customs' use of apportionment had the effect of modifying either prior rulings or "the treatment previously accorded . . . to substantially identical transactions," and, therefore, triggered 19 U.S.C. § 1625(c). As evidenced by the "Customs Information Exchange" letters, however, Customs has used apportionment in

the context of section 1466(a) for more than 40 years. Because apportionment is an established agency practice, its use does not constitute the revocation or modification of a previous ruling or treatment, and therefore section 1625(c) is inapplicable.

Conclusion

Accordingly, the judgment of the Court of International Trade is reversed.

REVERSED.

BRYSON, *Circuit Judge*, dissenting.

I respectfully dissent.

The vessel repair statute, 19 U.S.C. § 1466(a), imposes a duty on the "expenses of [ship] repairs made in a foreign country." In *Texaco Marine Services, Inc. v. United States*, 44 F.3d 1539 (Fed.Cir.1994), this court held that in determining whether a particular expense is a dutiable expense of repair, a "but for" test should be used. The court thus interpreted "expenses of repair" as covering "all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred. Conversely, 'expenses of repairs' does not cover expenses that would have been incurred even without the occurrence of dutiable repair work." 44 F.3d at 1544. Application of the "but for" test would render the dry-docking expenses at issue in this case non-dutiable, because the dry-docking was done for inspection and maintenance purposes as well as for repairs, and thus the expenses would have been incurred even without the occurrence of the dutiable repair work.

The court today holds that the expenses are dutiable by accepting the government's invitation to depart from the "but for" test of *Texaco* with respect to expenses that are attributable to two or more causes. In that setting, the court holds, the dutiable share of the expenses should be determined by apportionment between the dutiable repairs and the other cause or causes of the expenditure. I disagree with the court's adoption of this "multiple causes" gloss on *Texaco*. Instead, I would apply the "but for" test of *Texaco* in this context and, based on that test, I would uphold the decision of the Court of International Trade that the expenses at issue in this case are not dutiable.

As I read the decision in *Texaco*, the court anticipated cases of this sort. Particularly enlightening is the *Texaco* court's treatment of the earlier decision in the *Geo Hall Coal*

case to which the majority alludes. *Geo Hall Coal* involved dry-docking expenses that were incurred for the purpose of determining whether repairs were necessary. The dry-docking expenses in that case were held not to be dutiable. While the majority is correct that the cryptic statement of the facts by the Board of General Appraisers in the *Geo Hall Coal* case does not state that the dry-docking was necessary to perform the repairs at issue in that case, the *Texaco* court treated the dry-docking expenses as if they were necessary for the repairs. *See* 44 F.3d at 1546, quoting *Int'l Navigation Co. v. United States*, 38 Cust. Ct. 5, 148 F.Supp. 448 (Cust.Ct.1957). Based on that premise, the *Texaco* court concluded that the dry-docking expenses in that case nonetheless were not dutiable because they "would have been incurred irrespective of whether or not dutiable repairs were performed." 44 F.3d at 1547. As applied to this case, that principle means that the dry-docking expenses in this case should not be dutiable because those expenses would have been incurred irrespective of whether or not dutiable repairs had been performed.

In departing from the *Texaco* "but for" test, the court today looks to tort law principles of causation as applied to multiple tortfeasors. In that setting, the law generally holds each tortfeasor liable for the victim's injury if that tortfeasor's conduct was sufficient to cause the injury even if, because of the conduct of the others, the victim would have suffered the same injury absent each particular tortfeasor's conduct. For such cases, it makes good sense to depart from the "but for" test, because the consequences of adhering to the test would be that all of the multiple culpable actors would escape liability and the one innocent party—the victim—would be forced to bear the burden of the injury. In the context of the vessel repair statute, however, the question is not whether and how to compensate the victim of a wrong. Congress has determined that a duty of 50 percent on foreign repairs is the appropriate amount to protect the American

shipbuilding industry from foreign competition; the question before us is simply whether, in determining how to calculate that 50 percent duty, a particular expense should be attributed to the cost of repairs. And the answer to that question is best given by the formula set forth in *Texaco:* that the expense is not an expense of repair if it "would have been incurred irrespective of whether or not dutiable repairs were performed." 44 F.3d at 1546.

Quite apart from the teachings of the *Texaco* case, the government's proposed method of determining causation in a multiple cause setting finds no support in the vessel repair statute. The government's method requires Customs to apportion the costs in question between dutiable costs of repair and other, nondutiable costs. The statute, however, offers no guidance as to how such an apportionment should be conducted; in fact, the statute contains no reference to apportionment at all, which suggests that Congress did not have in mind that Customs would subdivide "multiple cause" expenses into dutiable and nondutiable portions.

Based on the language of the statute, as construed by this court in *Texaco*, I believe that the Court of International Trade applied the proper test for determining causation in the setting presented by this case, and I would therefore affirm the judgment of the trial court.

APPENDIX B

UNITED STATES COURT OF
INTERNATIONAL TRADE

SLIP OP. 02-121
Court No. 99-03-00151

SL SERVICE, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

Oct. 15, 2002

MEMORANDUM OPINION AND ORDER

TSOUCALAS, *Senior Judge.*

Plaintiff, SL Service, Inc. ("SL Service"), moves for summary judgment pursuant to USCIT R. 56 alleging that the undisputed material facts in this case show that, as a matter of law, the United States Customs Service ("Customs") misapplied the vessel repair statute, 19 U.S.C. § 1466 (1994), as interpreted in *American Ship Management, LLC v. United States*, 25 CIT —, 162 F.Supp.2d 671 (2001), and *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539 (Fed.Cir.1994), by assessing vessel repair duties on SL Service's dry-docking expenses on a pro-rata basis during a period of mandatory inspections by the American Bureau of Shipping ("ABS") and the United States Coast Guard ("USCG"). Customs contends that it acted legally by apportioning the dry-docking expenses on a pro-rata basis in a fashion mimicking the methodology used by Customs for

apportionment of expenses between dutiable and non-dutiable work. Since no genuine issue as to any material fact remains, and for the reasons stated below, SL Service's motion for summary judgment is granted.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (2000).

DISCUSSION

I. Background

On November 9, 1999, this Court granted an Order designating Consolidated Court Number 99-03-00151 a test case. Originally, this case included SL Service, Inc. and a second plaintiff, namely American Ship Management ("ASM"). ASM and SL Service filed a joint motion for summary judgment before this Court on November 9, 2000, and Customs filed a cross-motion for summary judgment on March 2, 2001. In *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671, this Court denied both motions and ordered that the parties proceed with the litigation on the merits.

By Order of Partial Dismissal dated February 28, 2002, ASM was dismissed, with prejudice, as a party in this pending action. SL Service proceeded with court ordered discovery and provided Customs with: (a) Sea-Land Pacific Drydock Report NOV/DEC 1995—HUD—HKG ("Dry-Docking Report"); (b) Sea-Land Pacific Planning Schedule; (c) Spreadsheet prepared by Joseph Breglia; and (d) Declaration of Joseph Breglia. *See* Pl. SL Service Inc.'s Mem. Supp. Mot. Summ. J. at 2-3 ("Pl.'s Mem."); *see also* Pl.'s Mem. at Exs. A-D.

II. Undisputed Facts

This case concerns dry-docking duties imposed by Customs on the vessel Sea-Land Pacific owned by SL Service.[1] *See American Ship Management*, 25 CIT —, 162 F.Supp.2d 671. The Sea-Land Pacific was dry-docked at the Hongkong United Dockyards Ltd. from November 22, 1995, through December 1, 1995, in order to comply with mandatory USCG and ABS regulations requiring certain inspections and modifications. During the dry-docking, the Sea-Land Pacific underwent non-dutiable modifications as well as dutiable repairs. The Sea-Land Pacific was not dry-docked for a period of time in excess of that necessary for mandatory inspections and/or modifications pursuant to the guidelines set forth in *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671.

III. Contentions of the Parties

SL Service asserts that the Dry-Docking Report and additional exhibits provided to Customs adequately show that "non-dutiable mandatory inspections and modifications occurred . . . from November 22, 1995 through December 1, 1995, and that no dry-docking occurred beyond the period [necessary for] non-dutiable mandatory inspections and/or modifications [to take place]." Pl.'s Mem. at 3; *see also* Pl.'s Statement of Material Facts Not in Issue at 2-3. SL Service contends that such documents support the argument that under the test established by *Texaco*, 44 F.3d 1539, and articulated in *American Ship Management*, 25 CIT —, 162

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[1] Plaintiff properly filed a Motion to Amend Summons, changing plaintiff's name from Sea-Land Service, Inc. to SL Service, Inc., on July 27, 2000. This Court granted SL Service's motion on August 29, 2000, and considers Customs' naming of plaintiff as Sea-Land Service, Inc., instead of SL Service, Inc. in this summary judgment proceeding, a mere oversight.

F.Supp.2d 671, none of the maintenance expenses of dry-docking the Sea-Land Pacific are dutiable and, therefore, summary judgment is appropriate. *See* Pl.'s Mem. at 4-7.

Customs continues to maintain that "the original methodology used by Customs in this action to apportion the dry-docking costs was reasonable, proper, and in accordance with law." Def.'s Mem. Resp. Pl.'s Mot. Summ. J. at 3. Customs, however, admits "that the Sea-Land Pacific was not dry-docked for any period of time in excess of that necessary for mandatory inspections and/or modifications pursuant to the guidelines set forth in *American Ship Management* [, and that] . . . none of the maintenance expenses of dry-docking are dutiable in this action." *Id.* at 3-4. Customs further contends that the discovery produced by SL Service "would not be generally sufficient to satisfy a plaintiff's burden as set forth in *American Ship Management*. . . ."[2] *Id.* at 3 n. 4.

IV. Analysis

A. *American Ship Management's* Application of *Texaco*

1. Statutory Background and the *Texaco* Test

Section 1466(a) of United States Code, Title 19, provides that

> [t]he equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the *expenses of repairs* made in a foreign country upon a vessel documented under the laws of the United States . . . shall . . . be liable to entry and the payment of

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[2] The Court is not amused by this argument, and finds that the evidence produced by SL Service, in addition to the statements provided by Customs in Defendant's Response to Plaintiff's Statement of Material Facts, clearly show that the Sea-Land Pacific was only dry-docked for the length of time necessary to perform non-dutiable mandatory inspections and/or modifications.

> an ad valorem duty . . . on the cost thereof in such foreign country.

19 U.S.C. § 1466(a) (emphasis added).

The case at bar involves the interpretation of the term "expenses of repairs" used in 19 U.S.C. § 1466(a). Prior to the Federal Circuit decision in *Texaco*, 44 F.3d 1539, Customs used a restrictive interpretation of the term. For example, Customs did not treat the dry-docking as an "expense of repairs" making dry-docking expenses non-dutiable. *See Texaco*, 44 F.3d 1539. Customs' pre-Texaco treatment was based upon the premise that dry-docking expenses were not "part of" and/or "directly involved" in a dutiable repair. *See id.*

The court in *Texaco* examined the statutory language, determined the language to be clear and unambiguous, and concluded that it is proper to

> interpret [the term] "expenses of repairs" as covering all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred. Conversely, [the term] "expenses of repairs" does not cover expenses that would have been incurred even without the occurrence of dutiable repair work. [In sum,] the "but for" interpretation accords with what is commonly understood to be an expense of a repair.

Texaco, 44 F.3d at 1544 (citations omitted).

> The court in *Texaco* also specified that [t]he mere drawing up of a vessel on a dry dock is not a part of her repairs, but is rather a method of making an inspection of her to determine whether any repairs are necessary. The examination might show the hull to be in perfect condition, requiring no attention of any kind.

Id. at 1546 (citing *United States v. Geo Hall Coal Co.*, 142 F. 1039 (2d Cir.1906)).

In *American Ship Management*, 25 CIT at —, 162 F.Supp.2d at 674, this Court observed that Customs started assessing duty on the dry-docking expenses which would not have been incurred "but for" dutiable repairs even if the expenses were not "part of" and/or "directly involved" in the repair itself, in light of the *Texaco* decision.

2. Apportionment Under the *Texaco* Test

In *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671, the plaintiff, SL Service, argued that any imposition of duties on dry-docking expenses on a pro-rata basis is per se illegal under the *Texaco* test. SL Service further pointed out that "the Federal Circuit has specifically ruled" that "mixed purpose dry-docking . . . do[es] not qualify as expenses of repairs." *American Ship Management*, 25 CIT at —, 162 F.Supp.2d at 674 (internal quotations and citation omitted). While the Court agreed with the plaintiff's reading of *Texaco* with regard to "mixed purpose" dry-docking expenses in *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671, the Court disagreed with the plaintiff's unreasonable expansion of the *Texaco* holding.

In essence, the court in *Texaco* delineated two categories of expenses under 19 U.S.C. § 1466(a), specifically: (1) dutiable expenses that would not be undertaken "but for" the need to repair; and (2) non-dutiable expenses undertaken for a purpose either unrelated to repair or for a "mixed purpose" related to a dutiable repair as well as to a non-dutiable activity, e.g., an inspection or modification. The *Texaco* classification, however, does not make an apportionment of dry-docking expenses per se illegal if there is a clear identification of the dutiable dry-docking expenses undertaken solely for the purpose of repair and the non-dutiable dry-docking expenses undertaken for a purpose either unrelated to repair or for a "mixed purpose." *See generally*, *Texaco*, 44 F.3d 1539. Therefore, the Court held that Customs correctly concluded that it could apportion dry-

docking expenses under the mandate of 19 U.S.C. § 1466(a), as clarified by *Texaco*, 44 F.3d 1539.

3. Pro-Rata Apportionment Used by Customs

In *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671, the dutiable and non-dutiable dry-docking expenses were apportioned by Customs according to the percentage corresponding to the value of dutiable repairs and non-dutiable expenses incurred by each vessel. While the general concept of apportionment of dry-docking expenses does not contradict the holding of *Texaco*, 44 F.3d 1539, the particular apportionment used by Customs was arbitrary, capricious and in violation of the classification designated by *Texaco*, 44 F.3d 1539.

Dry-docking expenses include, among other things, maintenance expenses and the cost of tugs to put the vessel into and out of dry dock.[3] *See, e.g., Dahlia Maritime Co. v. M/S Nordic Challenger*, 1993 WL 268413 (E.D.La.1993). Consequently, the cost of tugs is an inevitable expense of a mandatory inspection and, thus, is non-dutiable. *See Texaco*, 44 F.3d 1539. Similarly, all maintenance charges (along with all other charges related to the maintenance)[4] associated with the dry-docking during the period of mandatory inspection and/or modifications are non-dutiable expenses under the test posed by *Texaco* notwithstanding whether or not the vessel undergoes any repair during this period. *See id.* Therefore, only the maintenance expense of dry-docking for the period of time in excess of that necessary for a mandatory

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[3] The latter usually comprises the main expense of the dry-docking process.

[4] The term "maintenance" in the context of dry-docking usually associates with utilities and analogous services. The related charges could include, for example, the procedures and tools necessary to bring and keep the vessel in a stable position.

inspection and/or modifications are dutiable under the *Texaco* test. *See id.*

While, under an unlikely scenario, such calculation may create a result accidently corresponding to that reached by Customs in the given case, this possibility is irrelevant to the validity of Customs' method of calculation because the method violates, as a matter of law, the test offered by *Texaco*, 44 F.3d 1539. Accordingly, this Court, in *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671, ordered Customs to obtain from SL Service the information necessary to make a calculation supported by logic rather than random guessing.[5]

B. Determination at Bar

"On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action." *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F.Supp. 1048, 1050 (1988) (citation omitted). In this case, the parties now stipulate to the central fact at issue, namely, that the Sea-Land Pacific was not dry-docked for a period of time longer than

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[5] In *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671, Customs asserts that SL Service failed to satisfy the plaintiff's "burden" because, according to Customs, there was no pertinent information in the plaintiff's original brief. This Court presumed that Customs was referring to the term "burden of production." The term "burden of production" defines the burden on one party to introduce sufficient evidence to avoid judgment against that party as a matter of law. Specifically, the plaintiff shall go forward with the evidence on the issue, thus, shifting the burden to the defendant to produce evidence showing otherwise. *See, e.g., Environmental Defense Fund, Inc. v. EPA*, 179 U.S.App. D.C. 43, 548 F.2d 998, 1013 (D.C.Cir.1976) (noting that the burden of production does not necessarily lay with the same party carrying the burden of persuasion). In the case at bar, SL Service and Customs now stipulate that the vessel, Sea-Land Pacific, was not dry-docked for a period longer than that necessary to perform the mandatory inspections and/or modifications required by the USCG and ABS.

that necessary to perform the mandatory inspections and/or modifications pursuant to the guidelines set forth in *American Ship Management*, 25 CIT —, 162 F.Supp.2d 671. In accordance with the holding in *American Ship Management*, this Court finds that SL Service met its "burden of production," and therefore SL Service's motion for summary judgment is granted.

V. CONCLUSION

For the foregoing reasons, the Court grants SL Service's motion for summary judgment. Judgment will be entered accordingly.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed April 12, 2004]

03-1174

SL SERVICE, INC.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate for the court will issue on April 19, 2004.

FOR THE COURT,

/s/ Jan Horbaly [amt]
JAN HORBALY
Clerk

Dated: April 12, 2004

cc: Barbara S. Williams
Evelyn Suarez
Lauren R. Howard

SL SERVICE V US, 03-1174
(CIT- 99-03-00151)

APPENDIX D

19 U.S.C. § 1466: Equipment and repairs of vessels

(a) Vessels subject to duty; penalties

The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country. If the owner or master willfully or knowingly neglects or fails to report, make entry, and pay duties as herein required, or if he makes any false statement in respect of such purchases or repairs without reasonable cause to believe the truth of such statements, or aids or procures the making of any false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, such vessel, or a monetary amount up to the value thereof as determined by the Secretary, to be recovered from the owner, shall be subject to seizure and forfeiture. For the purposes of this section, compensation paid to members of the regular crew of such vessel in connection with the installation of any such equipments or any part thereof, or the making of repairs, in a foreign country, shall not be included in the cost of such equipment or part thereof, or of such repairs.

(b) Notice

If the appropriate customs officer has reasonable cause to believe a violation has occurred and determines that further proceedings are warranted, he shall issue to the person concerned a written notice of his intention to issue a penalty claim. Such notice shall—

(1) describe the circumstances of the alleged violation;

(2) specify all laws and regulations allegedly violated;

(3) disclose all the material facts which establish the alleged violation;

(4) state the estimated loss of lawful duties, if any, and taking into account all of the circumstances, the amount of the proposed penalty; and

(5) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why such penalty claim should not be issued.

(c) Violation

After considering representations, if any, made by the person concerned pursuant to the notice issued under subsection (b) of this section, the appropriate customs officer shall determine whether any violation of subsection (a) of this section, as alleged in the notice, has occurred. If such officer determines that there was no violation, he shall promptly notify, in writing, the person to whom the notice was sent. If such officer determines that there was a violation, he shall issue a written penalty claim to such person. The written penalty claim shall specify all changes in the information provided under paragraphs (1) through (4) of subsection (b) of this section.

(d) Remission for necessary repairs

If the owner or master of such vessel furnishes good and sufficient evidence that—

(1) such vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into such foreign port and purchase such equipments, or make such repairs, to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination;

(2) such equipments or parts thereof or repair parts or materials, were manufactured or produced in the United States, and the labor necessary to install such equipments or to make such repairs was performed by residents of the United States, or by members of the regular crew of such vessel; or

(3) such equipments, or parts thereof, or materials, or labor, were used as dunnage for cargo, or for the packing or shoring thereof, or in the erection of temporary bulkheads or other similar devices for the control of bulk cargo, or in the preparation (without permanent repair or alteration) of tanks for the carriage of liquid cargo; then the Secretary of the Treasury is authorized to remit or refund such duties, and such vessel shall not be liable to forfeiture, and no license or enrollment and license, or renewal of either, shall hereafter be issued to any such vessel until the collector to whom application is made for the same shall be satisfied, from the oath of the owner or master, that all such equipments or parts thereof or materials and repairs made within the year immediately preceding such application have been duly accounted for under the provisions of this section, and the duties accruing thereon duly paid; and if such owner or master shall refuse to take such oath, or take it falsely, the vessel shall be seized and forfeited.

(e) Exclusions for arrivals two or more years after last departure

(1) In the case of any vessel referred to in subsection (a) of this section that arrives in a port of the United States two years or more after its last departure from a port in the United States, the duties imposed by this section shall apply only with respect to—

(A) fish nets and netting, and

(B) other equipments and parts thereof, repair parts and materials purchased, or repairs made,

during the first six months after the last departure of such vessel from a port of the United States.

(2) If such vessel is designed and used primarily for transporting passengers or property, paragraph (1) shall not apply if the vessel departed from the United States for the sole purpose of obtaining such equipments, parts, materials, or repairs.

(f) Civil aircraft exception

The duty imposed under subsection (a) of this section shall not apply to the cost of equipments, or any part thereof, purchased, of repair parts or materials used, or of repairs made in a foreign country with respect to a United States civil aircraft, within the meaning of general note 3(c)(iv) of the Harmonized Tariff Schedule of the United States.

(g) Fish net and netting purchases and repairs

The duty imposed by subsection (a) of this section shall not apply to entries on and after October 1, 1979, and before January 1, 1982, of -

(1) tuna purse seine nets and netting which are equipments or parts thereof,

(2) repair parts for such nets and netting, or materials used in repairing such nets and netting, or

(3) the expenses of repairs of such nets and netting, for any United States documented tuna purse seine vessel of greater than 500 tons carrying capacity or any United States tuna purse seine vessel required to carry a certificate of inclusion under the general permit issued to the American Tunaboat Association pursuant to section 1374 of title 16.

(h) Foreign repair of vessels

The duty imposed by subsection (a) of this section shall not apply to—

(1) the cost of any equipment, or any part of equipment, purchased for, or the repair parts or materials to be used, or the expense of repairs made in a foreign country with respect to, LASH (Lighter Aboard Ship) barges documented under the laws of the United States and utilized as cargo containers,

(2) the cost of spare repair parts or materials (other than nets or nettings) which the owner or master of the vessel certifies are intended for use aboard a cargo vessel, documented under the laws of the United States and engaged in the foreign or coasting trade, for installation or use on such vessel, as needed, in the United States, at sea, or in a foreign country, but only if duty is paid under appropriate commodity classifications of the Harmonized Tariff Schedule of the United States upon first entry into the United States of each such spare part purchased in, or imported from, a foreign country, or

(3) the cost of spare parts necessarily installed before the first entry into the United States, but only if duty is paid under appropriate commodity classifications of the Harmonized Tariff Schedule of the United States upon first entry into the United States of each such spare part purchased in, or imported from, a foreign country.

(June 17, 1930, ch. 497, title IV, Sec. 466, 46 Stat. 719; Pub. L. 91-654, Sec. 1, Jan. 5, 1971, 84 Stat. 1944; Pub. L. 95-410, title II, Sec. 206, Oct. 3, 1978, 92 Stat. 900; Pub. L. 96-39, title VI, Sec. 601(a)(3), July 26, 1979, 93 Stat. 268; Pub. L. 96-467, Sec. 14(a)(3)(B), Oct. 17, 1980, 94 Stat. 2225; Pub. L. 96-609, title I, Sec. 115(a), Dec. 28, 1980, 94 Stat. 3558; Pub. L. 98-573, title II, Sec. 208, Oct. 30, 1984, 98 Stat. 2976; Pub. L. 100-418, title I, Sec. 1214(h)(4), Aug. 23, 1988, 102 Stat. 1157; Pub. L. 101-382, title III, Sec. 484E(a), Aug. 20, 1990, 104 Stat. 709; Pub. L. 103-465, title I, Sec. 112(b), Dec. 8, 1994, 108 Stat. 4825.)

APPENDIX E

19 C.F.R. § 4.14: Equipment purchases by, and repairs to, American vessels.

(a) General provisions and applicability. Under section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466), purchases for or repairs made to certain vessels while they are outside the United States, including repairs made while those vessels are on the high seas, are subject to declaration, entry and payment of ad valorem duty. This does not apply to reimbursement paid to members of the regular crew of a vessel for labor expended in making repairs to the vessel. These requirements are effective upon the first arrival of affected vessels in the United States or Puerto Rico. The vessels subject to these requirements include those documented under U.S. law for the foreign or coastwise trades, as well as those which were previously documented under the laws of some foreign nation or are undocumented at the time that foreign shipyard repairs are performed, but which exhibit an intent to engage in those trades under Customs interpretations. Duty is based on actual foreign cost. This includes the original foreign purchase price of articles which have been imported into the United States and are later sent abroad for use. For the purposes of this section, expenditures made in American Samoa, the Guantanamo Bay Naval Station, Guam, Puerto Rico, or the U.S. Virgin Islands are considered to have been made in the United States, and are not subject to declaration, entry or duty. Under separate provisions of law, the cost of labor performed, and of parts and materials produced and purchased in Israel are not subject to duty under the vessel repair statute. Additionally, expenditures made in Canada or in Mexico are not subject to any vessel repair duties. Even in the absence of any liability for duty, it is still required that all repairs and purchases, including those made in Canada, Mexico, and Israel, be declared and entered.

(b) Applicability to specific types of vessels.

(1) Fishing vessels. As provided in § 4.15, vessels documented under U.S. law with a fishery endorsement are subject to vessel repair duties for covered foreign expenditures. Undocumented American fishing vessels which are repaired, or for which parts, nets or equipment are purchased outside the U.S. are also liable for duty.

(2) Government-owned or chartered vessels. Vessels normally subject to the vessel repair statute because of documentation or intended use are not excused from duty liability merely because they are either owned or chartered by the U.S. Government.

(3) Vessels continuously away for two years or longer.

(i) Liability for expenditures throughout entire absence from U.S. Vessels that continuously remain outside the United States for two years or longer are liable for duty on any fish nets and netting purchased at any time during the entire absence. Vessels designed and used primarily for transporting passengers or merchandise, which depart the United States for the sole purpose of obtaining equipment, parts, materials or repairs remain fully liable for duty regardless of the duration of their absence from the United States.

(ii) Liability for expenditures made during first six months of absence. Except as provided in paragraph (b)(3)(i) of this section, vessels that continuously remain outside the United States for two years or longer are liable for duty only on those expenditures which are made during the first six months of their absence. See paragraph (h)(3) of this section. However, even though some costs might not be dutiable because of the six-month rule, all repairs, materials, parts and equipment-related expenditures must be declared and entered.

(c) Estimated duty deposit and bond requirements. Generally, the person authorized to submit a vessel repair declaration and entry must either deposit or transmit estimated duties or produce evidence of a bond on Customs Form 301 at the first United States port of arrival before the vessel will be permitted to depart from that port. A continuous or single entry bond of sufficient value to cover all potential duty on the foreign repairs and purchases must be identified by surety, number and amount on the vessel repair declaration which is submitted at the port of first arrival. At the time the vessel repair entry is submitted by the vessel operator to the appropriate VRU port of entry as defined in paragraph (g) of this section, that same identifying information must be identified on the entry form. Sufficiency of the amount of the bond is within the discretion of Customs at the arrival port with claims for reduction in duty liability necessarily being subject to full consideration of evidence by Customs. Customs officials at the port of arrival may consult the appropriate Vessel Repair Unit (VRU) port of entry as identified in paragraph (g) of this section or the staff of the Entry Procedures and Carriers Branch in Customs Headquarters in setting sufficient bond amounts. These duty, deposit, and bond requirements do not apply to vessels which are owned or chartered by the United States Government and are actually being operated by employees of an agency of the Government. If operated by a private party for a Federal agency under terms whereby that private party is liable under the contract for payment of the duty, there must be a deposit or a bond filed in an amount adequate to cover the estimated duty.

(d) Declaration required. When a vessel subject to this section first arrives in the United States following a foreign voyage, the owner, master, or authorized agent must submit a vessel repair declaration on Customs Form 226, a dual-use form used both for declaration and entry purposes, or must transmit its electronic equivalent. The declaration must be ready for

presentation in the event that a Customs officer boards the vessel. If no foreign repair-related expenses were incurred, that fact must be reported either on the declaration form or by approved electronic means. The Customs port of arrival receiving either a positive or negative vessel repair declaration or electronic equivalent will immediately forward it to the appropriate VRU port of entry as identified in paragraph (g) of this section.

(e) Entry required. The owner, master, or authorized representative of the owner of any vessel subject to this section for which a positive declaration has been filed must submit a vessel repair entry on Customs Form 226 or transmit its electronic equivalent. The entry must show all foreign voyage expenditures for equipment, parts of equipment, repair parts, materials and labor. The entry submission must indicate whether it provides a complete or incomplete account of covered expenditures. The entry must be presented or electronically transmitted by the vessel operator to the appropriate VRU port of entry as identified in paragraph (g) of this section, so that it is received within ten calendar days after arrival of the vessel. Claims for relief from duty should be made generally as part of the initial submission, and evidence must later be provided to support those claims. Failure to submit full supporting evidence of cost within stated time limits, including any extensions granted under this section, is considered to be a failure to enter.

(f) Time limit for submitting evidence of cost. A complete vessel repair entry must be supported by evidence showing the cost of each item entered. If the entry is incomplete when submitted, evidence to make it complete must be received by the appropriate VRU port of entry as identified in paragraph (g) of this section within 90 calendar days from the date of vessel arrival. That evidence must include either the final cost of repairs or, if the operator submits acceptable evidence that final cost information is not yet available, initial or interim cost estimates given prior to or after the work was authorized

by the operator. The proper VRU port of entry may grant one 30-day extension of time to submit final cost evidence if a satisfactory written explanation of the need for an extension is received before the expiration of the original 90-day submission period. All extensions will be issued in writing. Inadequate, vague, or open-ended requests will not be granted. Questions as to whether an extension should be granted may be referred to the Entry Procedures and Carriers Branch in Customs Headquarters by the VRU ports of entry. Any request for an extension beyond a 30-day grant issued by a VRU must be submitted through that unit to the Entry Procedures and Carriers Branch, Customs Headquarters. In the event that all cost evidence is not furnished within the specified time limit, or is of doubtful authenticity, the VRU may refer the matter to the Customs Office of Investigations to begin procedures to obtain the needed evidence. That office may also investigate the reason for a failure to file or for an untimely submission. Unexplained or unjustified delays in providing Customs with sufficient information to properly determine duty may result in penalty action as specified in paragraph (j) of this section. Extensions granted for the filing of necessary evidence may also extend the time for filing Applications for Relief (see paragraph (i)(1) of this section).

(g) Location and jurisdiction of vessel repair unit ports of entry. Vessel Repair Units (VRUs) are responsible for processing vessel repair entries. VRUs are located in New York, New York; New Orleans, Louisiana; and San Francisco, California. The New York unit processes vessel repair entries received from ports of arrival on the Great Lakes and the Atlantic Coast of the United States north of, but not including, those located in the State of Virginia. The New Orleans unit processes vessel repair entries received from ports of arrival on the Atlantic Coast from and including those in the State of Virginia, southward, and from all United States ports of arrival on the Gulf of Mexico including ports in Puerto Rico. The San Francisco unit processes vessel repair

entries received from all ports of entry on the Pacific Coast including those in Alaska and Hawaii.

(h) Justifications for relief from duty. Claims for relief from the assessment of vessel repair duties may be submitted to Customs. Relief may be sought under paragraphs (a), (d), (e), or (h) of the vessel repair statute (19 U.S.C. 1466(a), (d), (e), or (h)), each paragraph of which relates to a different type of claim as further specified in paragraphs (h)(1)-(h)(4) of this section.

(1) Relief under 19 U.S.C. 1466(a). Requests for relief from duty under 19 U.S.C. 1466(a) consist of claims that a foreign shipyard operation or expenditure is not considered to be a repair or purchase within the terms of the vessel repair statute or as determined under judicial or administrative interpretations. Example: a claim that the shipyard operation is a vessel modification.

(2) Relief from duty under 19 U.S.C. 1466(d). Requests for relief from duty under 19 U.S.C. 1466(d) consist of claims that a foreign shipyard operation or expenditure involves any of the following:

(i) Stress of weather or other casualty. Relief will be granted if good and sufficient evidence supports a finding that the vessel, while in the regular course of its voyage, was forced by stress of weather or other casualty, while outside the United States, to purchase such equipment or make those repairs as are necessary to secure the safety and seaworthiness of the vessel in order to enable it to reach its port of destination in the United States. For the purposes of this paragraph, a "casualty" does not include any purchase or repair made necessary by ordinary wear and tear, but does include the failure of a part to function if it is proven that the specific part was repaired, serviced, or replaced in the United States immediately before the start of the voyage in

question, and then failed within six months of that date.

(ii) U.S. parts installed by regular crew or residents. Relief will be granted if equipment, parts of equipment, repair parts, or materials used on a vessel were manufactured or produced in the United States and were purchased in the United States by the owner of the vessel. It is required under the statute that residents of the United States or members of the regular crew of the vessel perform any necessary labor in connection with such installations.

(iii) Dunnage. Relief will be granted if any equipment, equipment parts, materials, or labor were used for the purpose of providing dunnage for the packing or shoring of cargo, for erecting temporary bulkheads or other similar devices for the control of bulk cargo, or for temporarily preparing tanks for carrying liquid cargoes.

(3) Relief under 19 U.S.C. 1466(e). Requests for relief from duty under 19 U.S.C. 1466(e) relate in pertinent part to matters involving vessels normally subject to the vessel repair statute, but that continuously remain outside the United States for two years or longer. Vessels that continuously remain outside the United States for two years or longer may qualify for relief from duty on expenditures made later than the first six months of their absence. See paragraph (b)(3)(ii) of this section.

(4) Relief under 19 U.S.C. 1466(h). Requests for relief from duty under 19 U.S.C. 1466(h) consist of claims that a foreign shipyard operation or expenditure involves any of the following:

(i) Expenditures on LASH barges. Relief will be granted with respect to the cost of equipment, parts,

materials, or repair labor for Lighter Aboard Ship (LASH) operations accomplished abroad.

(ii) Certain spare repair parts or materials. Relief will be granted with respect to the cost of spare repair parts or materials which are certified by the vessel owner or master to be for use on a cargo vessel, but only if duty was previously paid under the appropriate commodity classification(s) as found in the Harmonized Tariff Schedule of the United States when the article first entered the United States.

(iii) Certain spare parts necessarily installed on a vessel prior to their first entry into the United States. Relief will be granted with respect to the cost of spare parts only, which have been necessarily installed prior to their first entry into the United States with duty payment under the appropriate commodity classification(s) as found in the Harmonized Tariff Schedule of the United States.

(i) General procedures for seeking relief.

(1) Applications for Relief. Relief from the assessment of vessel repair duty will not be granted unless an Application for Relief is filed with Customs. Relief will not be granted based merely upon a claim for relief made at the time of entry under paragraph (e) of this section. The filing of an Application for Relief is not required, nor is one required to be presented in any particular format, but if filed it must clearly present the legal basis for granting relief, as specified in paragraph (h) of this section. An Application must also state that all repair operations performed aboard a vessel during the one-year period prior to the current submission have been declared and entered. A valid Application is required to be supported by complete evidence as detailed in paragraphs (i)(1)(i)-(vi) and (i)(2) of this

section. Except as further provided in this paragraph, the deadline for receipt of an Application and supporting evidence is 90 calendar days from the date that the vessel first arrived in the United States following foreign operations. The provisions for extension of the period for filing required evidence in support of an entry, as set forth in paragraph (f) of this section, are applicable to extension of the time period for filing Applications for Relief as well. Applications must be addressed and submitted by the vessel operator to the appropriate VRU port of entry and will be decided in that unit. The VRUs may seek the advice of the Entry Procedures and Carriers Branch in Customs Headquarters with regard to any specific item or issue which has not been addressed by clear precedent. If no Application is filed or if a submission which does not meet the minimal standards of an Application for Relief is received, the duty amount will be determined without regard to any potential claims for relief from duty (see paragraph (h) of this section). Each Application for Relief must include copies of:

(i) Itemized bills, receipts, and invoices for items shown in paragraph (e) of this section. The cost of items for which a request for relief is made must be segregated from the cost of the other items listed in the vessel repair entry;

(ii) Photocopies of relevant parts of vessel logs, as well as of any classification society reports which detail damage and remedies;

(iii) A certification by the senior officer with personal knowledge of all relevant circumstances relating to casualty damage (time, place, cause, and nature of damage);

(iv) A certification by the senior officer with personal knowledge of all relevant circumstances

relating to foreign repair expenditures (time, place, and nature of purchases and work performed);

(v) A certification by the master that casualty-related expenditures were necessary to ensure the safety and seaworthiness of the vessel in reaching its United States port of destination; and

(vi) Any permits or other documents filed with or issued by any United States Government agency other than Customs regarding the operation of the vessel that are relevant to the request for relief.

(2) Additional evidence. In addition, copies of any other evidence and documents the applicant may wish to provide as evidentiary support may be submitted. Elements of applications which are not supported by required evidentiary elements will be considered fully dutiable. All documents submitted must be certified by the master, owner, or authorized corporate officer to be originals or copies of originals, and if in a foreign language, they must be accompanied by an English translation, certified by the translator to be accurate. Upon receipt of an Application for Relief by the VRU within the prescribed time limits, a determination of duties owed will be made. After a decision is made on an Application for Relief by a VRU, the applicant will be notified of the right to protest any adverse decision.

(3) Administrative protest. Following the determination of duty owing on a vessel repair entry, a protest may be filed under 19 U.S.C. 1514(a)(2) as the only and final administrative appeal. The procedures and time limits applicable to protests filed in connection with vessel repair entries are the same as those provided in part 174 of this chapter. In particular, the applicable protest period will begin on the date of the issuance of the decision giving rise to the protest as reflected on the relevant correspondence from the appropriate VRU.

(j) Penalties.—

(1) Failure to report, enter, or pay duty. It is a violation of the vessel repair statute if the owner or master of a vessel subject to this section willfully or knowingly neglects or fails to report, make entry, and pay duties as required; makes any false statements regarding purchases or repairs described in this section without reasonable cause to believe the truth of the statements; or aids or procures any false statements regarding any material matter without reasonable cause to believe the truth of the statement. If a violation occurs, the vessel, its tackle, apparel, and furniture, or a monetary amount up to their value as determined by Customs, is subject to seizure and forfeiture and is recoverable from the owner (see § 162.72 of this chapter).

(2) False declaration. If any person required to file a vessel repair declaration or entry under this section, knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any materially false, fictitious or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement, that person will be subject to the criminal penalties provided for in 18 U.S.C. 1001.

[T.D. 80-237, 45 FR 64565, Sept. 30, 1980, as amended by T.D. 82-227, 47 FR 54065, Dec. 1, 1982; T.D. 83-214, 48 FR 46511, Oct. 13, 1983; T.D. 84-149, 49 FR 28698, July 16, 1984; T.D. 84-213, 49 FR 41163, Oct. 19, 1984; T.D. 85-123, 50 FR 29952, July 23, 1985; T.D. 91-77, 56 FR 46114, Sept. 10, 1991; T.D. 93-57, 58 FR 39655, July 26, 1993; 58 FR 44128, 44130, Aug. 19, 1993; T.D. 94-41, 59 FR 18481, April 19, 1994; T.D. 95-77, 60 FR 50010, Sept. 27, 1995; T.D. 95- 78, 60 FR 50021, 50022, Sept. 27, 1995; T.D. 99-27, 64 FR 13674, 13675, March 22, 1999; T.D. 01-24, 66 FR 16397, March 26, 2001]